ORDER MO-1907

Appeal MA-020161-2

Toronto District School Board

NATURE OF THE APPEAL:

This is an appeal from a decision of the Toronto District School Board (the Board), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The decision was made in response to a request for access to the following documents:

1. the internal copy of the Safe School Policies Manual created by the Toronto District School Board;

2. a copy of the federal or provincial regulation, bill or act that allows for policy C.06 and its zero tolerance policy;

3. copies of any written, phone-logs, e-mail or fax transmissions referring to the requesters sent to or created by TDSB staff at [named school] commencing September 2000 to June 2001;

4. copies of any written, phone-logs, or e-mail transmissions referring to the requesters sent to or created by a number of named TDSB staff from September 2000 to July 31, 2001;

5. a copy of any type of correspondence, e-mails, fax, voice-messages, telephone logs which relate to the information from any TDSB staff that was given to Catholic Children's Aid Society relating to the requesters;

6. copy of letters from named TDSB staff leading to the issuance of a letter of restraint to the requester issued on or about January 15, 2001;

7. the reason why appeals for suspension for the requester's son "were not actioned by the TDSB superintendent in the proper forum during the school year of September 2000 to June 2001".

On April 30, 2002, the requester submitted another request which included the above points, and a final point (part 8) requesting "information relating to the reason for the Cease and Desist Letter that was issued by [a named individual] to the [requester's] family on or about December 17, 2001 "

The Board responded to the request in three separate decision letters. A summary of its decision is as follows:

1. *A copy of the Board's Safe School Policies Manual*

   There is no requirement under the *Act* to make the Manual available to the public. Alternatively, access is denied under s. 13.

2. *A copy of the federal or provincial regulation, bill or act that has been passed by the Government of Ontario or Canada that allows for the Board's policy C.06, Safe Schools.*

   This document is not created or maintained by the Board, and is available in the government bookstore and on its web site. Access is denied under s.1 and 10(1), and under 4(1)(b), 17(1.1) and 20.1 as frivolous and vexatious.

3. *All copies of any written documents, phone logs, e-mail or fax transmissions of any documentation sent to or created by Board staff at [named school] that give reference to [the requester's family] between September 2000 and the end of June 2001.*

   Responsive records are either subject to the earlier appeal (MA-010272-2 and Order MO–1574-F, currently under judicial review) or withheld under s. 12. The part of the request dealing with the [2000 – 2001] school year up to the date of the 2001 request is also denied under s. 20.1 as frivolous and vexatious.

4. *All copies of any written documents, e-mail, phone logs or e-mail transmissions of any information which refers to [the requester's family] that was sent to or created from September 2000 to July 31, 2001 by:*

   (a), (b) and (c) [Two named individuals] and the [named centre].

   For the first two named individuals and the [named centre], responsive records are either subject to the earlier appeal (MA-010272-2 and Order MO-1574-F, currently under judicial review) or withheld under s. 12. The part of the request dealing with the [2000 – 2001] school year up to the date of the 2001 request is also denied under s. 20.1 as frivolous and vexatious.

   (d) and (e) [Two named superintendents]

   There are no records from the first superintendent, and records are released from the second superintendent. The other responsive records are severed or withheld under s. 2(1), 4(1), 12, 13, 14, 38(a), 38(b) and 54(c).

   (f), (g) and (h) the Chairperson and other administrative staff

   There are no additional responsive records.

5. *All copies of any type of correspondence, e-mails, fax or e-mail transmissions or copies of voice messages or telephone logs which relate to the information from [named individuals] given to the Catholic Children's Aid Society regarding [the requester's family].*

There are no responsive records in addition to those which are part of the earlier appeal.

6. *All copies of any letters or other documents from [named individual] that led to their issuance of a letter of restraint that was issued on or about January 15, 2001 to [the requester].*

   Access is denied under s. 2(1), 4(1), 12, 13, 14, 38(a), 38(b) and 54(c).

7. *Why all the appeals for suspensions for [the requester's son] by his parents that were sent to the Board were not actioned by the Board Superintendent, in the proper forum during the school year of September 2000 to June 2001,*

   and,

8. *The reason for the "cease and desist" letter dated on or about December 17, 2001 to [the requester's family].*

   The *Act* applies only to recorded information pursuant to the definition of "personal information" in s. 2(1). The *Act* does not provide for the provision of a "reason" for issuing a document. (applies to both points 7 and 8)

The requester, now the appellant, appealed the Board's decisions.

During mediation, the Board replaced the reference to section 10(1) with section 15(a) of the *Act*. In the Mediators' Report, the issues in dispute are listed as: whether the Board conducted a reasonable search for records, whether the Board may raise section 15(a) (information publicly available) and if so, whether it applies, whether part of the request is frivolous and vexatious under sections 4(1)(b), 17(1.1) and 20.1(1.1), whether the records are exempt from disclosure under section 12 (solicitor client privilege), 13 (safety or health), 14 (invasion of privacy) and 38(a) and (b) (discretion to refuse requester's own information), and whether section 54(c) (access rights of a parent) and section 4(1) (custody and control) apply to the circumstances of this appeal.

Further mediation was not possible and the file was referred to adjudication. I sent a Notice of Inquiry initially to the Board, inviting it to submit representations on the facts and issues raised by the appeal. In this Notice, I indicated my preliminary determination that it was unnecessary to consider whether part of the request is frivolous and vexatious, and invited submissions on whether the doctrine of issue estoppel applies in the circumstances of this appeal. I then sent the Notice as well as portions of the Board's representations to the appellant, who has also submitted representations.

RECORDS:

- The Safe School Procedures Manual (Record 1)

- Approximately 80 records which were at issue in Appeal No. MA-010272-2 and covered by the determinations in Orders MO-1574-F and MO-1595-R (upheld in *Toronto District School Board v. John Doe* [2004] O.J. No. 2587)

- Records marked as 4A to 4M in the Board's Document Brief, and which consist of the severed portions of an email message and an agenda (4A and 4B), fax cover sheets (4C, 4D, 4L), handwritten notes (4F, 4G, 4I, 4K), a memo and its attachments (4E), an email message (4H), the severed portions of an Individual Education Plan (4J) and an audiotape (4M)

DISCUSSION:

ISSUE ESTOPPEL

As indicated above, approximately 80 of the records covered by the scope of this request were also at issue in Appeal No. MA-010272-2. In that appeal, the appellant's entitlement to access to these records was considered by Adjudicator Donald Hale in Orders MO-1574-F and MO-1595-R and by the Divisional Court on judicial review in *Toronto District School Board v. John Doe*, above. In the result, the appellant was granted access to some of the records at issue and denied access to others. Further, the appellant states that he has been provided with the records that the Board was ordered to disclose in those orders. This raises the question of whether I should consider the issue once again of whether the appellant is entitled to have access to these records.

In Order PO-1676, Assistant Commissioner Tom Mitchinson considered whether the doctrine of issue estoppel applied to decisions of this office:

> Some authorities assert that issue estoppel cannot apply to administrative tribunals, although this view is not universally accepted. In Administrative Law (3rd edition) by David J. Mullan (Carswell, 1996), the author states at page 274:
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> > The extent to which res judicata and issue estoppel pertain in the administrative process is uncertain. The bulk of authority holds either that they have no application or that they apply in a different and less decisive form than they do in the context of regular litigation.
>
> However, *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267, 112 D.L.R. (4th) 683 (Ont. C.A.), which dealt with the question of whether a tribunal decision can be the basis of issue estoppel before a court, would appear to suggest that issue estoppel, in some form, may be available in tribunal proceedings. In obiter comments made by Madam Justice Abella at pages 280-281, she states:

> ... the Policy objectives underlying issue estoppel, such as avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings, are enhanced in appropriate circumstances by acknowledging as binding the integrity of tribunal decisions.
> ...
>
> There is no basis for restricting the application of issue estoppel to decisions made by judges in the ordinary course of litigation.

The Ontario Court of Appeal explained the law of estoppel in the case of *Minott v. O'Shanter Development Co.*, (1999), 42 O.R. (3d) 321. Mr. Justice Laskin begins his discussion of estoppel as follows:

> I will first discuss the general principles underlying issue estoppel and then apply them to this case. Issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding. In this sense issue estoppel forms part of the broader principle of res judicata. ... Res judicata itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding. ... Issue estoppel is narrower than cause of action estoppel. It prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ.
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> The overall goal of the doctrine of res judicata, and therefore of both cause of action estoppel and issue estoppel, is judicial finality. "The doctrine prevents an encore, and reflects the law's refusal to tolerate needless litigation." [Holmested and Watson, Ontario Civil Procedure, v. II, s. 21 subsection 17[3]]
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> ...
>
> Issue estoppel has pervasive application and extends not just to decisions made by courts but, as this court's judgment in *Rasanen* affirms, also to decisions made by administrative tribunals. Whether the previous proceeding was before a court or an administrative tribunal, the requirements for the application of issue estoppel are the same. In *Angle* [*Angle v. M.N.R.* (1974), 47 D.L.R. (3d) 544 p. 555 (S.C.C.)] , Dickson J. set out three requirements, relying on English authority.
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> > Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935, [H.L.] defined the requirements of issue estoppel as:
> >
> > > ... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the

> judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

These three requirements have consistently been applied by Canadian courts.

In Order P-1392, former Inquiry Officer Anita Fineberg stated:

> In addition, the Commissioner's office may dismiss an appeal pursuant to section 52(1) without conducting an inquiry. One of the circumstances in which this may be done is if the appeal involves the same parties, issues and records which had previously been considered.

I agree with the above analysis and adopt it for the purposes of this appeal. This appeal and Appeal No. MA-010272-2 involve the same institution (the Board) and the same appellant. Orders MO-1574-F and 1595-R, issued in the context of Appeal No. MA-010272-2, decided the issue of the appellant's entitlement to have access to a number of records, approximately 80 of which are also before me. Whether as a matter of issue estoppel, or the application of section 41(1) (the equivalent to section 52(1) of the provincial *Act)*, I find that the policy of judicial finality would be undermined if I were to review the issue of access to these 80 records once again. These records are therefore excluded from the scope of this appeal.

The records remaining at issue are the Safe Schools Procedures Manual (the Manual) and those marked as 4A to 4M in the Board's Document Brief.

CAN THE APPELLANT EXERCISE ACCESS RIGHTS ON BEHALF OF HIS SON UNDER SECTION 54(c)?

Section 54(c) permits the exercise of rights under the *Act* on behalf of minors, in the following terms:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

The Board does not dispute that the appellant's son was under the age of sixteen at the time of the request. However, the Board states that even where it is accepted that a parent has lawful custody of a child, it is incumbent upon the adjudicator to determine whether the parent is exercising that right in the child's best interests. The Board submits that the affidavit evidence and portions of the records themselves suggest the contrary.

In Order P-673, on which the Board relies, former Assistant Commissioner Irwin Glasberg found that the disclosure of records maintained by the Office of Child and Family Service Advocacy responsive to a request from a custodial parent for records relating to his son would not be in the best interest of the child. The records related to a custody and child protection dispute involving

the father and his former spouse. The former Assistant Commissioner found that the requester father was seeking the information contained in the records in order to "meet his personal objectives and not those of his son." As a result, he held that the father was not entitled to exercise the access rights of his son in accordance with the provincial equivalent provision to section 54(c).

I find the circumstances of this appeal to be very different from those discussed in Order P-673, which arose out of a custody and child protection dispute. This argument was also previously raised by the Board in Appeal MA-010272-2, in relation to the appellant. Adjudicator Donald Hale rejected the Board's position, finding no basis for its contention that the request was made for some improper or collateral purpose (see Order MO-1574-F, upheld by the Divisional Court on judicial review in *Toronto District School Board v. John Doe*, above). The request in that appeal and the one before me arise out of the same set of circumstances, and can be viewed as part of ongoing issues between the appellant and the Board in relation to the education and treatment of his son by the Board. Although it may be that, as found by Adjudicator Hale, there is a high degree of animosity between the appellant and the Board's administration, this does not establish that the appellant is attempting to use the access provisions under the *Act* for improper or collateral purposes. I see no basis to reach a different conclusion from Adjudicator Hale, and I find that the appellant is entitled to exercise the access rights of his son under section 54(c).

This is also consistent with my findings in Order MO-1836, on a related request by the appellant and his wife.

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Board will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he is seeking and the Board indicates that further records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the Board to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Board must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Board's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In its representations, the Board describes its search for records. The Board identifies the officials who were contacted to co-ordinate the search, and the reasons why these individuals were suitable for this task. The Board provides copies of the directions given to these officials

about the search, in which the request is set out. Other details about the search are given in the Board's representations, such as when inquiries were made of certain individuals, and when the records were collected and reviewed. Where no records were located in respect of some aspects of the request, the Board provides reasons for this.

The appellant submits that additional records exist beyond those located by the Board. He relies on copies of notes made by a Board official in November of 2001, email messages from the same time period, a conversation between the appellant's wife and a Board official and other events of this time, in support of his position. I have reviewed this evidence, and I find that it does not establish a reasonable basis for concluding that additional records exist. This is consistent with my conclusions in Order MO-1836 in which I canvassed similar issues and evidence in relation to another request by this appellant.

In sum, based on the evidence provided, I am satisfied that the Board conducted a reasonable search for records responsive to the request.

FORM OF THE REQUEST

The Board takes the position that parts 7 and 8 are not proper requests, as the *Act* does not require the provision of reasons.

In Order M-493, Senior Adjudicator John Higgins addressed the argument that a request in the form of questions does not constitute a proper request under the *Act*, stating:

> "even if I agreed with the Board that the request is, for the most part, in the form of questions, I would not agree that, on this basis, the request is not a proper one under the *Act*. The Board has not provided any authority to substantiate this argument. Moreover, it would be contrary to the spirit of the *Act* to exclude a request on such a technical basis.
>
> In my view, when such a request is received, the Board is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section [24] of the *Act*, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", then the Board may have recourse to the clarification provisions of section [24(2)]."

The Board submits that parts 7 and 8 are stated in the form of a request for reasons. In relation to part 8, in which the appellant asks for the reason why a letter was sent to the appellant's family, it states that the letter itself provides the answer. The Board provides a copy of this letter. In relation to part 7, in which the appellant asks for the reason why a Board official failed to take certain actions, the Board submits that it is argumentative and signifies an attempt by the appellant to use the *Act* to compel a response from the Board that he is unable to obtain otherwise.

The Board also submits that the appellant has already made requests for all of the records of the Board official named in part 7.

In his submissions, the appellant does not directly address the issue of whether parts 7 and 8 of his request constitute a proper request for records under the *Act*. He asserts that he is entitled to answers to his questions, and he provides his reasons as to why the Board's actions in relation to his son were improper.

On my review of the representations and evidence, I am satisfied that the Board fulfilled its obligations in the manner in which it has responded to parts 7 and 8 of the request. In addressing this issue, the appellant's representations demonstrate a continuing and vigorous disagreement with the decisions and actions taken by the Board with respect to his son. I am satisfied that parts 7 and 8 of his request are an extension of this same disagreement, rather than a request for records *per se*.

I am satisfied that the Board considered whether other records might contain information that would answer the questions asked, and properly decided that no response was warranted.

RESPONSIVENESS

The Board takes the position that Record 4M, an audiotape, is not responsive to the request. It relies on the fact that the request covers records "sent to or created by a number of named TDSB staff from September 2000 to July 31, 2001".

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose or spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

I have reviewed the audiotape at issue, and the wording of the request. The request is clear and unambiguous about time frame covering the records sought. Based on the Board's submissions about the timing of the communications on the audiotape, I find that it does not fall within the time frame specified by the appellant. Record 4M, the audiotape, is not responsive to the request and it is unnecessary to consider it further.

LATE RAISING OF DISCRETIONARY EXEMPTION

The *Code of Procedure for appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* (New Discretionary Exemption Claims) sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Section 15 is a discretionary exemption that must be raised within 35 days of the issuance of the Confirmation of Appeal by this office. In this case, the Confirmation of Appeal for this file is dated July 19, 2002. The Board was advised in the Confirmation of Appeal that it had until August 26, 2002 to raise any new discretionary exemptions. As indicated above, the Board replaced the reference to section 10(1) in its decision with section 15(a) on January 27, 2003, approximately 150 days after this deadline. In the Mediator's Report, this was described as an issue about the late raising of a discretionary exemption claim.

The Board submits that in its decision of May 2002, it clearly stated that "these are not documents created or maintained by the Board, and are publicly available from the Government bookstore, as well as its web site." Its response was clearly directed to the section 15(a) exemption. However, it referred to section 10(1), through inadvertence, rather than section 15(a). Section 10(1), relating to disclosure of trade secrets, is clearly inapplicable to this appeal, in the Board's submission.

The appellant asks that I reject the Board's position on this issue.

I am satisfied that the Board's initial reference to section 10(1) was inadvertent and that the substantive elements of the section 15(a) were referred to in its decision letter to the appellant. There has been no prejudice to the appellant as a result of this amendment to the Board's position, and it would be unduly technical in the circumstances to refuse what is in essence a correction of a clerical error.

I will therefore consider whether section 15(a) applies in the circumstances of this appeal.

RECORDS PUBLICLY AVAILABLE

Section 15(a) states:

> A head may refuse to disclose a record if,
>
> > the record or the information contained in the record has been published or is currently available to the public

In order for records to qualify for exemption under section 15(a), they must either be published or available to members of the public generally, through a regularized system of access such as, for example, a public library or a government publications centre. [See Orders P-327, P-1316, P-1387 and PO-1655]

The purpose of section 15(a) relates to questions of convenience (Order 170). Where the record in dispute constitutes a copy of the entire published document, the balance of convenience leans in favour of the institution and the record can be properly withheld. Where the records at issue constitute only a portion of a much larger document, the balance of convenience does not favour the institution. [See Orders M-773 and P-1384]

The Board submits that to the extent that part 2 of the request is directed at obtaining access to federal or provincial regulations or statutes, these materials are publicly available through a regularized system of access. The Board relies on Order P-1387 in support of its position.

Further, the Board submits that this part of the request is not in fact a request for records, but for the legal basis for a particular Board policy. In this regard, it asks for a legal opinion, or requires the Board to defend the legality of its policy.

The appellant states that he is content with obtaining access to government statutes electronically. His submissions on section 15(a) are directed to the Board's Safe Schools Procedures Manual, which is not at issue under this section.

Given the appellant's position, I am satisfied that to the extent that part 2 of the request can be interpreted as a request for access to statutes and regulations, the appellant has effectively withdrawn this part of the request.

In any event, for the same reasons as I expressed above in relation to parts 7 and 8 of the request, I also agree with the Board that part 2 is more of a request for the Board's legal justification for actions taken, rather than a request for specific records, and in this sense is not a proper request under the *Act*.

CUSTODY & CONTROL

In its representations, the Board states that it no longer relies on section 4(1), except for the records at issue in part 2 of the request. Because of my findings under section 15(a), it is not necessary to determine whether these are in the custody or under the control of the Board.

PERSONAL INFORMATION

General principles

In order to determine whether the remaining exemptions under the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official

or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Analysis

The Board acknowledges and I find that the records contain the personal information of the appellant and his son. The Board submits that the records also contain the personal information of a number of other individuals, including Board employees. It states that the personal information of these individuals includes their names, their telephone numbers, fax numbers, email addresses, titles and other identifying information.

The Board asserts that the words "except when provided in a professional capacity" do not appear in the *Act* and that the personal/professional distinction in previous IPC decisions (such as the ones referred to above) cannot stand.

I do not accept the position of the Board. The interpretation of section 2(1) is well established and consistent with the Legislature's use of the term "*personal* information" [my emphasis]. I find that the information of Board employees in the records is about them in a professional or official capacity, and not in a personal capacity. However, based on Order PO-2225, I find that certain portions of the records reveal facts of a personal nature about one of these Board employees. These portions are found in Records 4E and 4F. Other than these portions, I am satisfied that the information of the Board employees does not qualify as their "personal information".

Two of the severed portions of Record 4B refer to individuals who are not Board employees. On balance, on my review of the record, I find that the information about one of these individuals only qualifies as personal information.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Since the appellant is exercising the rights of his son under section 54(c), section 36(1) also gives him a general right of access to his son's personal information. Section 38 provides a number of exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion"

of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 38(b). Section 14(2) provides some criteria for determining whether the personal privacy exemption applies. Section 14(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has ruled that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the "compelling public interest" override at section 16 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

Above, I determined that the records contain the personal information of the appellant and/or his son. I also found that Records 4B, 4E and 4F contain the personal information of individuals other than the appellant and/or his son. This raises the issue of whether this information is exempt from disclosure under section 38(b), in conjunction with any applicable portion of section 14.

It was not asserted, and I find that none of the presumptions in section 14(3) apply to this appeal. The Board relies on sections 14(2)(e), (f) and (h) to justify withholding the personal information in the records. In his representations, the appellant submits that these sections do not apply. These sections provide:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence

Based on my review of the information at issue and the representations of the Board, I find that sections 14(f) and (h) are relevant considerations weighing against the disclosure of the personal information in Records 4E and 4F. Prior orders have established that for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual: see Orders M-1053, P-1681 and PO-1736. I am satisfied that disclosure of the information could reasonably be expected to cause excessive personal distress to the individual whose personal information is contained in these records. Also, given the circumstances, it is a reasonable conclusion that the information was provided to the Board in confidence.

The appellant asserts that he and his family are the ones who have suffered harm by the non-disclosure of the documents. While I appreciate the appellant's interests in obtaining all the information he can about the Board's interactions with his family and his son, he has not established that any of the factors in section 14(2), or any unlisted factors, weigh in favour of disclosure of this information.

I conclude that disclosure of the personal information in Records 4E and 4F would constitute an unjustified invasion of personal privacy, and it therefore qualifies for exemption under section 38(b).

None of the submissions address the relevance of any of the criteria in section 14(2) to the portion of Record 4B that I have found contains personal information of an individual who is not a Board employee. However, based on the information in the record itself, I find section 14(2)(h) applicable. Further, I am not satisfied that any of the factors in section 14(2) or any unlisted factors weigh in favour of disclosure. On balance, I find that disclosure of the information would be an unjustified invasion of personal privacy, and it therefore qualifies for exemption under section 38(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/OTHER EXEMPTIONS

In addition to section 38(b), section 38(a) also provides an institution with the discretion to deny an individual access to his or her own personal information, where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

In this case, the Board applied section 38(a) in conjunction with sections 12 and 13 to Records 4E and 4I, and section 38(a) in conjunction with section 13 to Records 4A, 4B, 4C, 4D, 4F, 4G, 4H, 4K and 4L.

Solicitor-Client Privilege

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches, a common-law privilege and a statutory privilege. In the circumstances of this appeal, it is unnecessary to discuss the two branches separately.

The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Representations

The Board submits that section 12 applies to exempt certain portions of Records 4E and 4I, relying on the definition of the solicitor-client communication privilege as formulated in *Descôteaux v. Mierzwinski*, above. It states that these portions record the receipt of legal advice from the Board's legal counsel and communications from Board employees to legal counsel, all in the context of obtaining legal advice over safety concerns in relation to the appellant's family. In addition, the Board claims litigation privilege with respect to a portion of Record 4I.

The appellant submits that as he does not know what is in these records, he cannot determine whether solicitor-client privilege applies.

I have reviewed the severed portions of these records, and I am satisfied that they represent direct communications between employees of the Board and its counsel, as part of a continuum of communications aimed at keeping both informed within the context of the giving or receiving of legal advice. Accordingly, I am satisfied that this information is covered by the solicitor-client communication privilege and qualifies for exemption under section 12. Further, I find no basis for finding any waiver of the privilege.

As a result of my finding, it is unnecessary to consider whether litigation privilege also applies.

Threat to Safety or Health

Section 13 states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

As indicated above, the Board relies on section 38(a) in conjunction with section 13 to exempt the records containing the personal information of the appellant. Further, the Board relies on section 13 to exempt Record 1, the Board's Safe Schools Procedures Manual.

In support of its position, the Board filed four affidavits. Based on the information in these affidavits, which were not shared with the appellants, some of the records at issue in this appeal and in Appeal No. MA-020157-2, and other correspondence, the Board submits that disclosure of the information in the records could reasonably be expected to seriously threaten the safety or health of an individual.

As indicated earlier, based on the analysis in *Ontario (Minister of Labour)*, the Board must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure, or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

In *Ontario (Minister of Labour)*, the court had evidence before it establishing that the requester had made threats to employees of the office whose records were at issue and that the requester had been legally restrained from entering certain premises of the Office of the Worker Advisor (OWA). Further, there was evidence of medical and psychiatric reports which expressed concerns that the requester would act out past threats of violence against staff of the OWA.

It should be noted that the evidence submitted by the Board in this appeal is substantially the same as that before Adjudicator Donald Hale in Appeal MA-010272-2, also involving this appellant. Additional evidence filed in the present appeal relies on the same incidents described in the evidence before Adjudicator Hale. Although each case must be determined on its own facts, and on consideration of the particular records at issue, I am supported in my conclusions by the findings of Adjudicator Hale in that appeal (in Orders MO-1574-F and MO-1595-R) that section 13 did not apply to exempt the records before him. These conclusions were upheld by

the Divisional Court in *Toronto District School Board v. John Doe*, above, which reviewed the evidence and found Adjudicator Hale's conclusions reasonable. On the potential for harm by the appellant, the court stated:

> In our view it was not unreasonable for the adjudicator to conclude that the Board failed to discharge the burden of proving that the disclosure of the records would create a serious threat of harm to the safety and health of anyone on the part of the father.

With respect to the son, the court stated:

> It must be noted that notwithstanding the worst of the incidents involving the threats made by the son when 13 years old toward an individual in January and February of 2001, no disciplinary action was taken nor is there any evidence of any specific fear of the son expressed by the object of the threats. The only evidence of any fear of the son is expressed by an educator who was not the object of the threats, but who on reviewing the records formed an opinion. However, there is no psychiatric evidence of a propensity to carry out threats nor has the adjudicator made his decision in the face of evidence "pointed toward the opposite result" as in the Big Canoe case. The absence of extensive reasons does not detract from the reasonableness of the adjudicator's conclusion on this evidentiary record.

Following this court decision, in Order MO-1836, I considered much of the same evidence, in the context of another request for records by this appellant. In that order, I stated:

> The material submitted by the Board establishes a pattern of confrontational behaviour by the appellants in their dealings with Board employees and officials. Accepting the Board's evidence, the appellants have been aggressive and even verbally abusive to Board staff. There is no evidence, however, of threats made by the appellants to the physical safety of Board staff. Further, unlike the circumstances in the *Ontario (Minister of Labour)* case, there is no psychiatric evidence showing a concern about the appellants carrying out acts of violence. On balance, I am not satisfied that the Board has met the burden of proof to show that disclosure of the records would create a serious threat of harm to the safety and health of anyone on the part of the appellants.
>
> I must also consider whether the harm under section 13 has been established in relation to the appellants' son, as there is the possibility that any information obtained by the appellants will be shared with him.
>
> Accepting the Board's evidence, the appellants' son has engaged in threatening and abusive behaviour to other individuals, some of whom include Board employees. The most serious allegations in relation to Board staff concern threats made by him when he was 13 years old in January and February of 2001. While disturbing, there is no evidence that any disciplinary action was taken against him

> as a result of these threats, although prior misconduct by the appellants' son had been the subject of Board discipline.
>
> On my review, I also note that the records before me do not involve any of the Board staff against whom the threats were made in January and February of 2001. Further, the appellants' son no longer attends the schools where those individuals are located.
>
> The appellants' son is also alleged to have made threats against certain individuals (who are not Board employees) in September of 2001, leading to criminal charges which were ultimately withdrawn. Based on the information before me, if the records remaining at issue under section 13 involved any of these individuals, I might have reason to apply this exemption to this information. However, they do not. Further, some of the information was conveyed by one of the appellants in telephone conversations with Board employees (the severed information in Records B1, and some of the information in Records C18 and C19). Given this, I am not convinced that disclosure of this information could reasonably be expected to seriously threaten the safety or health of any individual.
>
> Other records record the observations or actions of Board employees in relation to the appellants or their son, or discussions with the appellants (the severed information in Record C3, Records C6, C7, C18 and C19). Some are simply fax cover sheets with no substantial information (Records C10, C11 and C21). Finally, Records C12 and C21 record instructions given to Board staff. None of these records has any direct relationship to the events in January, February and September of 2001. None can reasonably be viewed as inflammatory in itself. Again, I am not convinced that disclosure of any of this information, even given these events, could reasonably be expected to seriously threaten the safety or health of any individual.

I find much of the above analysis applicable to the circumstances of this appeal, particularly given the high degree of overlap in the facts of the two appeals. As in Appeal No. MA-020157-2, in relation to the appellant, the Board's evidence at its highest is that he has been aggressive and confrontational with Board staff, but there is no evidence of threats made to physical safety. There is still no psychiatric evidence showing a concern about the appellant carrying out acts of violence.

As to the appellant's son, if I accept the Board's evidence, he has engaged in threatening and abusive behaviour towards other individuals, including Board employees. A factual difference between the two appeals is that in the one before me, some of the information at issue relates to a Board employee against whom it is alleged the appellant's son made threats. It should be noted that some of the information in relation to this individual is exempt under section 38(b)/14 in any event (see my findings above). Further, as I indicated in the above order, no disciplinary action was taken against the appellant's son as a result of the threats and the appellant's son no longer attends the school in question. As in Appeal No. MA-02157-2, the most serious allegations against the son are not in relation to Board employees, but to other individuals. Finally, the

events described by the Board occurred between three and four years ago.

Taking into account all of the above, and even given some factual differences between the various appeals, I see no reason to reach a different conclusion on the application of section 13 as that reached by both this office and the Divisional Court in the other appeals involving this appellant.

I conclude that disclosure of the information at issue could not reasonably be expected to seriously threaten the safety or health of any individual. Section 13 does not apply to exempt Record 1, nor does section 38(a) in conjunction with section 13 apply to the other records at issue.

EXERCISE OF DISCRETION

Above, I have found some of the information in the records exempt under sections 38(a) (in conjunction with section 12) and 38(b) (in conjunction with section 14). These are discretionary exemptions in that they permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Board has provided submissions on its exercise of discretion under these provisions. I have reviewed these submissions, and I see nothing inappropriate in the manner in which it exercised its discretion.

ADDITIONAL ISSUE IN RELATION TO SAFE SCHOOLS PROCEDURES MANUAL

In its representations, the Board makes an additional submission about its Safe Schools Procedures Manual, which it describes as relating to the "scope of the *Act*."

The Board submits that there is no requirement under the *Act* to make the Manual available to the public. This is in contrast, it submits, with section 33 of the provincial *Act*, which states:

> 33. (1) A head shall make available, in the manner described in section 35,
>
> (a) manuals, directives or guidelines prepared by the institution, issued to its officers and containing interpretations of the provisions of any enactment or scheme administered by the institution where the interpretations are to be applied by, or are to be guidelines for, any officer who determines,
>
> (i) an application by a person for a right, privilege or benefit which is conferred by the enactment or scheme,

> (ii) whether to suspend, revoke or impose new conditions on a right, privilege or benefit already granted to a person under the enactment or scheme, or
>
> (iii) whether to impose an obligation or liability on a person under the enactment or scheme; or
>
> (b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.

The Board submits that unlike the vast majority of sections in the provincial *Act*, there is no counterpart to this requirement in the *Act*. As the same legislative body passed both *Acts*, the Board states, it was the intention of the legislature that manuals ought not to be subject to the municipal *Act*.

I do not accept the Board's submission. Section 33 of the provincial *Act* is part of a scheme of public access that does not necessitate a formal request for records under the *Act*, based on the underlying premise that certain manuals, directives and other "internal law" should be conveniently accessible to the public. Where records are or ought to made available to the public under section 33, the search or preparation fees that would normally apply to a request for record do not apply. [see Order PO-1682]

The Board does not argue that there is a basis, apart from section 33 of the provincial *Act*, for finding the Manual excluded from the scope of the *Act*, and I find none. To the extent that certain records are excluded from the scope of the *Act*, these exclusions are specifically delineated: see section 52(2) to (4). The Manual does not fall under any of these exclusions. The effect of the Board's submission is that I ought to "read in" an additional exclusion, based on section 33 of the provincial *Act*. The Board has provided no authority or support for this submission, and I do not accept it. Nowhere in the *Act* before me is section 33 referred to, and it would be an extraordinary result indeed if the existence of a scheme for greater and more convenient access in the provincial jurisdiction were to provide a basis for weakening access rights in the municipal sector. I find no basis for such a conclusion, either as a matter of legal interpretation or policy.

I therefore find that the Manual is covered by the scope of the *Act*.

ORDER:

1. I order disclosure of all of the records, with the exception of the records discussed under "Issue Estoppel" above, Record 4M, and the portions of Records 4B, 4E, 4F and 4I that I have found exempt.

2. Disclosure is to be made by sending the appellant copies of the records ordered to be disclosed by **March 31, 2005**.

3. For greater certainty, I have sent the Board copies of Records 4B, 4E, 4F and 4I showing the portions to be withheld in yellow highlighting.

4. In order to verify compliance, I reserve the right to require the Board to provide me with a copy of the records disclosed to the appellant pursuant to the above provisions, upon request.

Original signed by: March 1, 2005
Sherry Liang
Adjudicator